NO. 50129-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL WILLIAMS, II, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 14-1-05086-2

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
BRITTA HALVERSON
Deputy Prosecuting Attorney
WSB # 44108

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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2. Whether defendant is entitled to raise a "real facts doctrine" issue on appeal where he received a standard range sentence and failed to raise a timely and specific objection to the sentencing court's consideration of the allegedly improper information?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On December 19, 2014, the Pierce County Prosecutor's Office charged MICHAEL WILLIAMS, II (hereinafter "defendant") with two counts of Human Trafficking in the First Degree, one count of Kidnapping in the First Degree, two counts of Promoting Commercial Sexual Abuse of

a Minor, and one count of Promoting Prostitution in the Second Degree. CP 1-4.[1]

On February 8, 2017, defendant pleaded guilty to one count of Human Trafficking in the Second Degree with an aggravating factor that any victim was a minor at the time of the offense. CP 234, 236-245; RP[2] 57-64. *See also*, CP 235. The parties agreed that the State would argue for a standard range sentence, and defendant could argue for an exceptional sentence below the standard range. CP 239; RP 43-44. Defendant's standard range was 129 to 171 months. CP 237, 282; RP 59-60, 162.

In his statement on plea of guilty, defendant made the following factual statement:

> In the State of Washington between Dec. 7 & Dec. 18, 2014 I provided transport and hotel accommodations on 12/8/14 knowing the transport and hotel would be used for commercial sex transactions. I acted with reckless disregard as to the ages of the participants in the commercial sex activity, two of whom were under the age of 18. I also expected to benefit financially from the prostitution as a participant in the venture.

CP 244.

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[1] A corrected information, second corrected information, amended information, second amended information, third amended information, and fourth amended information were later filed with the court. CP 8-11, 12-15, 79-83, 207-209, 234, 315.

[2] The verbatim report of proceedings ("RP") is contained in three consecutively paginated volumes.

Sentencing was held on March 10, 2017. CP 278-292; RP 68, 71. Defendant filed a Sentencing Memorandum on March 9, 2017, wherein he requested an exceptional sentence of 22 to 29 months based on RCW 9.94A.535(1)(a).[3] CP 252-271. The State filed its own Sentencing Memorandum and Response to Defendants' Request for Exceptional Sentence Below the Standard range on March 10, 2017. CP 295-301. *See also*, RP 71-73.

At the sentencing hearing, Detective Maurice Washington of the Seattle Police Department testified on behalf of the State and provided a general description of human trafficking and its participants (i.e., the detective gave a "general understanding of girls of this age, how and why they end up in this type of scenario, what happens to them once they get there"). CP 274; RP 75-80. Defendant was afforded the opportunity to cross-examine Detective Washington. RP 81-86.

The mother of victim R.M.O. addressed the court. RP 90-95. *See* CP 298-299. The State then addressed the court and provided its sentencing recommendation. RP 95-99, 127-136. Defense counsel addressed the court, followed by defendant's mother. RP 115-124, 124-

[3] Defendant also argued that his youth was a mitigating factor. CP 267-269.

127, 136-138. Defendant also addressed the court during sentencing and stated,

> [A.M.A.], I had no problems with her. [R.M.O.], no problems with them. I smoked with them, yes. I treated them like they were adults because that's what I thought that they were…I should have cared, but, honestly, I didn't. I didn't care…Who am I to judge if a girl wants to do that? I know girls that do that.
>
> …
>
> I don't understand how this got blown so much out of proportion.
>
> …
>
> Yes, I participated. I knew what was going, yes…but I can't beat the fact that they are under 18. Everybody knows it. This is just a little bit of people in the room. Imagine if there was a trial. Twelve people, bing, bing, bing. Raped, sodomized. I'm going to lose, period, and I'm not stupid. I know that.
>
> …
>
> I was never mean. I was there three days…As [a] man, I should have realized or cared more to find out about their ages, but it never crossed my mind because they never gave me a reason to. I'm not saying it is okay if they were 18. We all know it is nasty, but that is what they participated in and wanted to do.

RP 148-150, 152. *See generally*, RP 145-153.

Defendant never objected during the sentencing hearing.

Defendant never requested an evidentiary hearing on a disputed material fact.

The State requested the high-end of the standard range, or 171 months. RP 99, 162; CP 296, 301. Defendant requested an exceptional sentence below the standard range. CP 252-253; RP 116. The court imposed a standard range sentence of 150 months followed by 18 months of community custody. CP 285-286; RP 163. Defendant filed a timely notice of appeal. CP 308.

2. FACTS[4]

On or about December 8, 2014, defendant provided transport and hotel accommodations, knowing they would be used for commercial sex transactions. CP 244, 258. As part of the commercial sex activity, photos of young women were taken and posted on Backpage.com as advertisements for prostitution. CP 260, 263. Defendant expected to benefit financially from the prostitution activities. CP 244.

Two of the prostitution participants – R.M.O. and A.M.A. – were under the age of 18 at the time. CP 244, 298-299; RP 131, 148-150. A.M.A. had a difficult upbringing that included sexual abuse by her biological father and abandonment by her mother, and R.M.O. was a chronic runway who rebelled and ran away from home at a young age. CP 261-262, 298-299. A.M.A. and R.M.O. were 16 and 15 years old,

[4] Because defendant pleaded guilty before trial, the fact-finding process was limited. Defendant did not object to any of the information provided to the sentencing court.

respectively, at the time they were trafficked by defendant and would have been freshmen in high school. CP 298-299; RP 98, 131. In contrast, defendant was 22 years old, married, and with a child at the time the crime was committed. CP 267, 269, 299; RP 98.

C. ARGUMENT.

1. THE STATE ADHERED TO THE PLEA AGREEMENT BY RECOMMENDING A STANDARD RANGE SENTENCE AND ARGUING IN SUPPORT OF ITS POSITION FOR THE HIGH-END OF THE STANDARD RANGE.

A plea agreement is a contract between the State and the defendant. ***State v. Sledge***, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997) (quoting ***State v. Mollichi***, 132 Wn.2d 80, 90, 936 P.2d 408 (1997)). Because a defendant gives up important constitutional rights by entering into a plea agreement, due process requires the State to adhere to the agreement by recommending the agreed-upon sentence. *Id.* at 839. Although the State need not enthusiastically make the sentencing recommendation, it must act in good faith, participate in the sentencing proceedings, answer the court's questions candidly, and hold back no relevant information regarding the plea agreement. *Id.* at 840. "The State's duty of good faith requires that it not undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement." ***State v. Carreno-***

Maldonado, 135 Wn. App. 77, 83, 143 P.3d 343 (2006) (citing ***Sledge***, 133 Wn.2d at 840; ***State v. Jerde***, 93 Wn. App. 774, 780, 970 P.2d 781 (1999)). A breach occurs where the State offers unsolicited information via "report, testimony, or argument that undercuts the State's obligations under the plea agreement." ***Carreno-Maldonado***, 135 Wn. App. at 83.

On appeal, the court applies an objective standard to determine whether the State breached the plea agreement. ***State v. MacDonald***, 183 Wn.2d 1, 8, 346 P.3d 748 (2015) (citing ***Sledge***, 133 Wn.2d at 843 n. 7). The reviewing court considers the entire sentencing record and asks whether the prosecutor contradicted the State's recommendation by either words or conduct. ***State v. Williams***, 103 Wn. App. 231, 236, 11 P.3d 878 (2000). The issue of whether the State breached the plea agreement is reviewed de novo, and the appropriate remedy for a breach "is to remand for the defendant to choose whether to withdraw the guilty plea or seek enforcement of the State's agreement." ***State v. Neisler***, 191 Wn. App. 259, 265-66, 361 P.3d 278 (2015).

Here, defendant claims that the State breached the plea agreement by "implicitly advocating for an exceptional sentence and objecting to the defense's argument for a downward deviation." Brief of Appellant at 3. This claim fails. Considering the sentencing record as a whole, the State adhered to the agreement by recommending the agreed-upon standard

range sentence. Defendant had previously acknowledged and agreed that while he could argue for an exceptional sentence downward, the State was not in agreement with that recommendation and instead would be advocating for a standard range sentence. CP 239; RP 44. The State's argument in support of its position for the *high-end* of the standard range therefore did not undercut its obligations under the plea agreement.

"[T]he State does not breach the agreement when it reiterates certain facts necessary to support a high-end standard range recommendation." ***State v. Carreno-Maldonado***, 135 Wn. App. 77, 84, 143 P.3d 343 (2006). Thus, as in the present case, a prosecutor does not undercut a plea agreement merely by vigorously advocating the State's position for a sentence recommendation that differs from the defendant's recommendation. *See, e.g.,* ***Carreno-Maldonado***, 135 Wn. App. at 84 ("As to the mid-point sentencing recommendations for each of the second degree rapes, we recognize that it may be necessary to recount certain potentially aggravating facts in order to safeguard against the court imposing a lower sentence"); ***State v. Monroe*** 126 Wn. App. 435, 439-40, 109 P.3d 449 (2005), *overruled on other grounds by* ***State v. Clarke***, 156 Wn.2d 880, 134 P.3d 188 (2006) (State did not breach plea agreement by recounting salient facts supporting the State's high-end sentencing

recommendation, including that defendant's acts were "'one of the most significant crime sprees' the prosecutor could remember," and then unequivocally urging the court to accept the State's recommendation).

Here, the parties had different sentencing recommendations. *See* CP 239; RP 44. The State recommended the high-end of the standard range, and defendant requested an exceptional sentence below the standard range. CP 252-253, 296, 301; RP 99, 116, 162. Defendant claims that the State improperly advocated for an aggravating factor that would result in an upward sentence.[5] Brf. of App. at 6-8. However, in context, it is clear

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[5] Defendant also claims that the State improperly argued that he "committed higher crimes that were not charged." *See* Brf. of App. at 8 (citing RP 131-32, wherein the State argued that R.M.O. was the victim of "Rape Child III"). Defendant's claim is without merit for several reasons. First, defendant pleaded guilty to human trafficking in the second degree, which is a class "A" felony. CP 234, 236-245; RCW 9A.40.100(3). Rape of a child in the third degree is a class "C" felony. RCW 9A.44.079. Human trafficking in the second degree is more "serious" than rape of a child in the third degree. *See* RCW 9.94A.515. The State therefore did not argue that defendant committed other "higher crimes." Second, defendant's plea acknowledged that he provided transport and hotel accommodations knowing both would be used for commercial sex transactions, and two of the commercial sex participants were under the age of 18. CP 244. One of the participants, specifically, was 15 years old. CP 293, 294, 298. By having sexual intercourse with adult male customers at least 48 months older than her, the 15-year-old participant was thus the victim of rape of a child in the third degree. RCW 9A.44.079. The State's comments were accurate. Finally, the State's comments were in response to defendant and co-defendant Escalante's arguments that the victim(s) in this case were "willing participants" as well as "accomplices and...co-conspirators." *See* RP 101-14; CP 255, 258 ("not only have the co-conspirators not been charged but they are protected from prosecution for prostitution offenses by statute...Thus, RMO, AMA...will not face any consequences for their actions as co-conspirators, initiators or willing participants"), 267. The State was not arguing that the court should impose an exceptional sentence because defendant was an accomplice to rape of a child in the third degree. Rather, considering the sentencing record as a whole, the State was explaining why it referred to R.M.O. and A.M.A. as "co-conspirators" in its Notice of Intent to Admit Co-Conspirator Statements under ER 801(d)(2)(v) and how that theory worked based on the charges. CP 316; RP 127-32. The fact that the State referred to R.M.O. and A.M.A. as "co-conspirators" for purposes of admitting their statements at trial did not "mean that they

that the State was not advocating, implicitly or explicitly, for an exceptional sentence upward, but rather was responding to defendant's argument in support of his request for an exceptional sentence downward.

Defendant relied primarily on RCW 9.94A.535(1)(a) as the basis for his request for an exceptional sentence downward.[6] That provision provides,

> (1) Mitigating Circumstances – Court to Consider
> The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.
> (a) *To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.*

RCW 9.94A.535(1)(a) (emphasis added). Defendant argued that the minor female victims in this case – the participants of the commercial sex activity – were "co-conspirators, initiators, or willing participants." CP 258. *See also*, CP 270; RP 116.

RCW 9.94A.535(3)(l), however, expressly provides that it is an aggravating factor if, "[t]he current offense is...trafficking in the second degree and any victim was a minor at the time of the offense." Here,

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were criminally liable to the level [of the] defendant." RP 131. Rather, at least one of the underage girls was legally the victim of rape of a child in the third degree. RP 131-32.

[6] Defendant also argued that his youth was a mitigating factor that supported a sentence below the standard range. CP 267-269; RP 117-119.

defendant pleaded guilty to trafficking in the second degree *aggravated* by the circumstance that any victim was a minor at the time of the offense. CP 234, 236-245. By the terms of the plea agreement, the State was permitted to argue for the high-end of the standard sentencing range and against defendant's exceptional sentence downward recommendation. CP 239. The State did not object to defendant arguing for an exceptional sentence based on mitigating factors.[7] However, the State did argue its own position and recount those facts necessary to support its high-end recommendation. *See* ***Carreno-Maldonado***, 135 Wn. App. at 84; ***Monroe*** 126 Wn. App. at 440.

In support of its position, the State pointed out the flaws in the rationale for defendant's sentencing recommendation. The State argued that it was illogical for defendant to use the aggravating factor to which he pleaded guilty as the "mitigating circumstance" justifying his request for an exceptional sentence downward (i.e., that the minor victim of defendant's trafficking conduct was an initiator, willing participant,

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[7] Defendant claims the State "objected to the right of defense counsel to argue for the necessary mitigating factors for a downward sentence." Brf. of App. at 3, 6. The record does not support this claim. The State objected once during sentencing. RP 121. The State objected to defense counsel's use of other Pierce County cases "to argue that [defendant] deserves a sentence similar to their factual situation and charges," where the charges were *not* the same as defendant's, and the facts of those cases were not presented to the court. RP 121. *See* RP 121-23; CP 255-257. Those cases were therefore not "commensurate" with the potential punishment to be imposed upon defendant. RCW 9.94A.010(3).

aggressor, or provoker of the incident).[8] In its sentencing memorandum, the State argued,

> ...Williams [is] requesting [an] exceptional sentence[] below the standard range alleging that "to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident."
>
> In fact, however, RCW 9.94A.535(3)(l), indicates a person convicted of "human trafficking in the second degree and any victim was a minor at the time of the offense" is an **aggravating factor.**

CP 297 (emphasis in original). *See also*, CP 295 ("This memorandum also responds to...Williams's request for [an] exceptional sentence[] below the standard range"). The State did not ask the court to find the aggravating factor supported an exceptional sentence upward. Rather, the State argued that the aggravating factor cited above effectively eliminated the persuasiveness, if any, of the mitigating circumstance relied on by defense. *See also,* RP 135-36. The State therefore did not breach the

[8] At sentencing, the State argued it was "appalling" to think that defendant was the real victim and "these girls at the time were sophisticated, were aggressors, were initiators, were willing participants." RP 74. The State further argued, "The position is, because she is a troubled youth, because she is a runaway, because she is familiar with the streets, that she also is an initiator...a willing participant. They just don't understand what human trafficking is all about." RP 75. *See also*, RP 95-99. These comments were in response to the arguments made in defendant's sentencing brief. CP 252-271. *See, e.g.,* CP 258 ("not only have the co-conspirators not been charged but they are protected from prosecution for prostitution offenses by statute...Thus, RMO, AMA...will not face any consequences for their actions as co-conspirators, initiators or willing participants"). The State's arguments here were proper and constituted nothing more than vigorous advocacy in support of its standard range sentencing recommendation.

terms of the plea agreement by arguing in support of its high-end sentencing recommendation.

State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997), cited by defendant in his brief, does not change this result. *See* Brf. of App. at 5. There, as part of a plea agreement, both parties recommended a standard range disposition of 21 to 28 weeks on the charge of taking a motor vehicle without permission. ***Sledge***, 133 Wn.2d at 830-31. Despite the agreement, the State insisted on an evidentiary hearing with live witnesses, "where [the State] called and vigorously examined a probation counselor and a parole officer on aggravating factors supporting an exceptional disposition based on manifest injustice. [The State] then gave a summation detailing the aggravating factors."[9] *Id.* at 830-31. The sentencing court imposed an exceptional disposition of 103 weeks. *Id.* at 830. On appeal, the Washington Supreme Court found that based on the State's "unmistakable advocacy for an exceptional sentence," the State breached the plea agreement. *Id.* at 843.

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[9] For example, in ***Sledge***, the probation counselor testified regarding her Manifest Injustice Report, detailed Sledge's long criminal history, and explained why she was recommending an exceptional sentence of 103 weeks. *Id.* at 832-35. The State "walked [the probation officer] through her written report, step by step, getting [her] to recite for the trial court the bases for all the aggravating factor [she] had employed to reach her recommendation of an exceptional sentence." *Id.* at 835. The State then elicited testimony from a parole officer regarding Sledge's "institutional problems." *Id.* Finally, the State "gave a summation of the evidence regarding the aggravating factors supporting an exceptional disposition," leaving the sentencing court "uncertain" about the State's recommendation. *Id.* at 837.

Here, the State did not insist upon an evidentiary hearing. *See* RP 42-43, 72. The parties had different sentencing recommendations. CP 239, 253, 296; RP 44, 99, 116. While the State did call one witness at sentencing – Detective Washington – that witness was not examined on aggravating factors supporting an exceptional sentence. Rather, the witness testified regarding human trafficking in general. *See* RP 75-80. The witness did not provide a sentencing recommendation and did not discuss defendant specifically. Instead, the witness served as a response to defendant's claim that the female victims in his case were "willing participants." RP 74-75. As the State argued to the court,

> [Their] position is, because [the victim] is a troubled youth, because she is a runaway, because she is familiar with the streets, that she also is an initiator, is a person who the court should find is a willing participant. They just don't understand what human trafficking is all about.
>
> I would ask to call Detective Washington for a brief understanding, factual – subject to cross by defense – of that background. A general understanding of girls of this age, how and why they end up in this type of scenario, what happens to them once they get there.

RP 75. *See also,* CP 258-267. The sentencing court was not uncertain about the State's recommendation. *See* RP 99-100, 162. Thus, ***Sledge*** is not "remarkably similar" to the case at hand as defendant alleges but instead is distinguishable. *See* Brf. of App. at 5.

The State did not breach the terms of the plea agreement. The State unequivocally asked the court to impose the high-end of the standard range, as agreed. RP 96, 99; CP 296. Based upon the entire sentencing record, the State properly advocated its position for a sentence recommendation that differed from the defendant's recommendation. Defendant's sentence should be affirmed.

2. DEFENDANT IS NOT ENTITLED TO RAISE A REAL FACTS DOCTRINE ISSUE WHERE HE RECEIVED A STANDARD RANGE SENTENCE AND FAILED TO RAISE A TIMELY AND SPECIFIC OBJECTION TO THE COURT'S CONSIDERATION OF THE ALLEGEDLY IMPROPER INFORMATION.

Under the Sentencing Reform Act of 1981 (SRA), a sentencing court must generally impose a sentence within the standard range. RCW 9.94A.505(2)(a)(i). Generally, sentences within the standard sentence range are not appealable. RCW 9.94A.585(1) ("A sentence within the standard sentence range...shall not be appealed"); ***State v. Osman***, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). "However, this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to a particular sentencing provision. Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the

determination of what sentence applies." ***State v. Williams***, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (internal citations omitted).

A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. ***State v. Adamy***, 151 Wn. App. 583, 587, 213 P.3d 627 (2009) (citing ***State v. Cunningham***, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)). A decision which applies the incorrect legal standard is a decision based on untenable grounds or made for untenable reasons. ***Adamy***, 151 Wn. App. at 587 (citing ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

A defendant may not appeal the imposition of a standard range sentence unless the court categorically refuses to exercise its discretion or denies an exceptional sentence based on impermissible reasons. ***State v. Grayson***, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); ***State v. McGill***, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002). The failure to consider an exceptional sentence authorized by law is an abuse of discretion subject to reversal. ***Grayson***, 154 Wn.2d at 342. However, "[w]hen a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling." ***McGill***, 112 Wn. App. at 100.

Moreover, the trial court has discretion to sentence a defendant within the sentence range, and so long as the sentence falls within the

standard sentence range, there can be no abuse of discretion as to the sentence's length. RCW 9.94A.530(1); ***State v. Williams***, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). A defendant may appeal a standard range sentence only if the sentencing court failed to comply with the procedural requirements of the SRA, RCW 9.94A, or constitutional requirements. ***Osman***, 157 Wn.2d at 481-82.

Here, defendant argues that his standard range sentence is appealable, because (1) the State relied on an uncharged and unproven crime of Rape Child III, (2) the State presented evidence outside the record, and (3) the trial court failed to grant an evidentiary hearing on disputed material facts. Brf. of App. at 9-10. Defendant relies on RCW 9.94A.530(2), which sets out the "real facts doctrine" and provides,

> In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

RCW 9.94A.530(2).

The real facts doctrine limits sentencing decisions to the facts that were acknowledged, pleaded to, or proven, and it prohibits trial courts from imposing a sentence based on facts that compose the elements of an additional, unproven crime, or facts that would elevate the degree of the charged crime. ***State v. Wakefield***, 130 Wn.2d 464, 475-76, 925 P.2d 183 (1996); ***State v. Houf***, 120 Wn.2d 327, 332, 841 P.2d 42 (1992). *See also*, ***State v. Coats***, 84 Wn. App. 623, 626, 929 P.2d 507 (1997) (real facts doctrine requires sentences to be based on defendant's current conviction, criminal history, and circumstances of crime).

However, "[t]he real facts doctrine only bars reliance on those facts *wholly unrelated* to the current offense or those facts which would elevate the degree of the crime charged to a *greater offense* than charged. ***State v. Reynolds***, 80 Wn. App. 851, 857, 912 P.2d 494 (1996) (emphasis added) (quoting ***State v. Tierney***, 74 Wn. App. 346, 352, 872 P.2d 1145 (1994)). A "trial court is not prohibited from considering those facts closely connected to the circumstances underlying the charged offense simply because they also establish elements of additional uncharged crimes." ***Tierney***, 74 Wn. App. at 351.

Here, defendant received a standard range sentence. RP 162-63; CP 278-292. To be entitled to raise a real facts doctrine issue, defendant must first show that he raised a timely and specific objection to the sentencing court's consideration of the allegedly improper information. ***State v. Mail***, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); ***State v. Grayson***, 154 Wn.2d 333, 338-39, 111 P.3d 1183 (2005). "Defendants who receive a standard range sentence must object to unproven assertions of fact presented at sentencing to preserve error under the real facts doctrine." ***State v. Heurtelou***, No. 71216-1-I, 2015 WL 321541, at *1 (Wash. Ct. App. January 26, 2015) (unpublished).[10] Defendant failed to object to any of the statements made by the State during sentencing. Defendant's failure to raise a timely and specific objection to the court's consideration of the allegedly improper information constitutes an acknowledgement for purposes of RCW 9.94A.530(2). Because defendant failed to object and preserve error under the real facts doctrine, his claim is not reviewable.[11]

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[10] GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

[11] Both ***State v. Barnes***, 117 Wn.2d 701, 818 P.2d 1088 (1991), and ***State v. Wakefield***, 130 Wn.2d 464, 925 P.2d 183 (1996), cited by defendant in his brief, are distinguishable from the present matter. *See* Brf. of App. at 9-10. Those cases involved the real facts doctrine as applied to exceptional sentences, rather than standard range sentences. ***Barnes***, 117 Wn.2d at 703; ***Wakefield***, 130 Wn.2d at 470.

Without citation to the record, defendant makes the bald assertion that his dispute of the material facts at sentencing was made "abundantly clear." Brf. of App. at 12-13. This claim is not supported by the record. Defendant did not raise a single objection during the sentencing hearing. Defendant did not request an evidentiary hearing on a disputed material fact. Defendant is therefore not entitled to raise a real facts doctrine issue, and this Court should decline to review his standard range sentence.

Even if this Court were to consider defendant's unpreserved claim of error, the real facts doctrine was not violated.[12] Defendant claims the State improperly alleged an uncharged and unproven crime of Rape of a Child in the Third Degree. *See* Brf. of App. at 10. This claim fails for two reasons. First, Rape of a Child in the Third Degree is not a "greater offense" than Human Trafficking in the Second Degree. *See* ***Reynolds***, 80

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[12] At the conclusion of the argument section of his brief, without citation to the record or legal analysis, defendant claims that defense counsel improperly filed its sentencing memorandum the day before the sentencing hearing. *See* Brf. of App. 13. To the extent that defendant is attempting to raise an ineffective assistance of counsel claim, the merits of such a claim should be summarily rejected due to defendant's failure to assign error and support the claimed error with any meaningful analysis. *See* RAP 10.3(a)(4),(6). Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Disciplinary Proceeding against Whitney***, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)); RAP 10.3(a). *See also,* ***State v. Stubbs***, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), *reversed by* 170 Wn.2d 117 (2010) ("[p]assing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review").

Wn. App. at 857 (real facts doctrine bars reliance on facts which would elevate the degree of the crime charged to a greater offense). Rape of a Child in the Third Degree is a class "C" felony with a seriousness level of VI, whereas Trafficking in the Second Degree is a class "A" felony with a seriousness level of XII. RCW 9A.44.079; RCW 9A.40.100(3); RCW 9.94A.515. Defendant pleaded guilty to the latter offense. CP 236-245.

Second, it was acknowledged that one of the victims – R.M.O. – was 15 years old at the time defendant committed his offense. CP 244, 293, 294, 298; RP 131-32. *See also*, RCW 9.94A.535(3)(l). R.M.O. was thus the victim of Rape of a Child in the Third Degree by virtue of her having sexual intercourse with adult male customers as part of the commercial sex activity. RCW 9A.44.079. This fact was related to the offense to which defendant pleaded guilty. *See* ***Tierney***, 74 Wn. App. at 351-52.

Defendant also argues the State presented evidence outside the record. *See* Brf. of App. at 11-13 (citing RP 96-98, 128-30). However, the State's comments during sentencing directly related to defendant's admitted participation in commercial sex activity involving minors. "The real facts doctrine only bars reliance on those facts *wholly unrelated* to the current offense." ***Reynolds***, 80 Wn. App. at 857 (emphasis added). *See also* ***Tierney***, 74 Wn. App. at 351-52. Because the State's unobjected-to

comments were related to the offense to which defendant pleaded guilty, the real facts doctrine was not violated.[13]

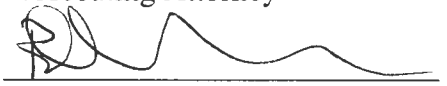
The information provided by the State to the sentencing court was related to the offense to which defendant pleaded guilty and did not elevate the degree of the crime charged to a greater offense. ***Reynolds***, 80 Wn. App. at 857. The real facts doctrine was not violated. And, because defendant failed to object and failed to dispute any material facts, the sentencing court did not err in not granting an evidentiary hearing that was never requested. This Court should affirm defendant's standard range sentence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction and sentence below.

DATED: September 29, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRITTA HALVERSON
Deputy Prosecuting Attorney
WSB # 44108

[13] Moreover, defendant provides no citation to the record to support his contention that the trial court relied on the allegedly improper information in imposing the standard range sentence.

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-2-17 Theresa Kallop
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

October 02, 2017 - 10:58 AM

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Appellate Court Case Title:	State of Washington, Respondent v Michael Williams, II, Appellant
Superior Court Case Number:	14-1-05086-2

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